Filed 5/31/07 Welch v. St. George CA2/2

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LARRY WELCH et al.,

Plaintiffs and Appellants,

v.

ST. GEORGE et al.,

Defendants and Respondents.

B189271

(Los Angeles County
Super. Ct. No. GC035047)

APPEAL from an order of the Superior Court of Los Angeles County. C. Edward Simpson, Judge. Affirmed.

Law Offices of Tabone and Derek L. Tabone for Plaintiffs and Appellants.

Hahn & Hahn, William K. Henley and Rita M. Diaz for Defendants and Respondents.

Larry Welch and Judith B. Welch (appellants) appeal an order dismissing their lawsuit for failure to post an undertaking. We affirm.

## CONTENTIONS

Appellants contend that the fifth amendment to the partnership agreement of St. George, a California Limited Partnership,[1] is invalid. The amendment requires the posting of an undertaking in the event that any partner initiates an action against the partnership, unless a court finds that the partner's claims have probable validity. Appellants contend that: (1) the amendment was not validly adopted; (2) the amendment is unconscionable; (3) the amendment violates the United States Constitution; and (4) the amendment is unenforceable as contrary to public policy. Appellants further contend that even if the amendment were enforceable, the trial court erred in determining that appellants' claims lacked probable validity.

## BACKGROUND

### 1. Formation of St. George and Welch's failure to pay a 1976 assessment

St. George was formed in 1974 to acquire and operate a 50-unit apartment complex in Huntington Beach, California. It has since acquired interests in two more apartment buildings. Appellants' original investment in the partnership was 43 units, or approximately 27 percent.[2] Respondent Harlan Bixby (Bixby) owned 60 of the units. Originally there were 10 partners of St. George, but over the years partnership interests

---

[1] St. George; Harlan K. Bixby (the general partner of St. George); and Bixby's inter vivos trust, the 1995 Separate Property Trust (the Bixby Trust) will be collectively referred to as "respondents."

[2] Larry Welch was the original owner of the units. He claims that he married plaintiff Judith Welch and now she is a co-owner of the 43 units. Respondents state that Larry Welch has not instructed St. George to transfer any of his units to Judith Welch, therefore respondents do not believe Judith Welch has any interest in St. George. For the purposes of this opinion, we will assume that Judith Welch shares Larry Welch's interest in the partnership.

have been bought and sold and partners have died. Currently there are only four limited partners: the Bixby Trust, Bradley Bixby, Cranford Scott, and appellants.

Paragraph 6b of St. George's limited partnership agreement (agreement) authorizes the general partner to call upon the limited partners to contribute additional capital in order to fund partnership operations. In November 1976, acting under the authority of paragraph 6b, Bixby notified the partners of a $325.00 per unit assessment, totaling $52,000. Part of the assessment was due on December 3, 1976 ($36,000.00) and part was due on January 31, 1977 ($16,000.00). Welch and a former limited partner, Patrick McVay (McVay), failed to meet this assessment. As a result, Bixby and limited partners Edward Bassett, Bradley Bixby, and Curtis Joiner (the subscribing partners) paid Welch's share.

Since the failure to tender additional capital in order to fund partnership operations would substantially impair the partnership's operations, paragraph 6b imposes severe penalties on partners who fail to pay an assessment and offers financial incentives for the remaining limited partners to assume a defaulting limited partner's share of the assessment. As a result of Welch's failure to pay the assessment due in December 1976 and January 1977, the general partner invoked the penalty provisions of paragraph 6b. As a result, the subscribing partners (1) permanently succeeded to 25 percent of Welch's interest in future profits of the partnership and (2) became entitled to receive all distributions that would otherwise have been made to Welch until such time as the subscribing partners received their entire capital contributions, including any subsequent contributions, together with interest thereon at 10 percent per year. Welch's interest in future profits was reduced from nearly 27 percent to just over 20 percent.

**2. Litigation over the interpretation of paragraph 6b**

In July 1977, Welch, McVay, and one other limited partner filed a complaint in Orange County Superior Court against Bixby, St. George, and the other limited partners seeking declaratory relief, removal of the general partner, dissolution of the partnership, and the appointment of a receiver. Welch challenged Bixby's right to levy an assessment under paragraph 6b of the agreement, and sought a declaration from the court that the agreement was, in this regard, "incomplete and inherently contradictory." Following a lengthy bench trial that began on July 6, 1982, the Orange County Superior Court entered a 48-page statement of decision, dated January 6, 1983.

The superior court found that "paragraph 6(b) of the partnership agreement is not incomplete, contradictory or arbitrary." The superior court's opinion read in part:

> "[The subscribing partners] will receive distributions including those which would have been made to Welch, by priority, until such time as they shall have received their entire capital contributions (including subsequent contributions). In other words, the investors who have succeeded to Welch's 25% defaulted interest are entitled to receive everything Welch would have received, 100%, until they have received their entire capital contributions. In effect, two things have contractually happened: (1) Welch's distributions go to the successors, 100%, and as a result of their having picked up the financial slack to protect the partnership, (2) the successors' capital and subsequent contributions will have been repaid to them before the rest of the investors, including Welch, have had their capital and subsequent contributions returned."

As to the proper sequence of partnership profit distributions, the trial court held that "distributions should initially be returns of capital and subsequent contributions," and "[i]nterest on the amounts advanced by the successors was at 10% per annum . . . and interest will be compounded (cumulative) in the event the interest is not paid annually." The court further held that, "Once the successors have reached the point of having all their capital and subsequent contributions reimbursed, then all partners will participate in the distribution of cash on a pro-rata basis in accordance with their new percentage interests in the partnership's profits."

Welch appealed from the superior court's 1983 judgment, and Bixby cross-appealed. On July 31, 1986, the Court of Appeal, Fourth Appellate District, affirmed the trial court's interpretation of paragraph 6b in a nonpublished opinion. (*Welch v. Bixby* (Jul. 31, 1986, G000182).) However, the Court of Appeal made one modification. Regarding the capital contributions that are subject to interest, the Court of Appeal held:

> "In addition to permanently losing 25 percent of his share of future profits, a limited partner, by failing to meet an assessment, receives <u>no</u>

> distributions until the subscribing partners are repaid their capital contributions with interest. . . .
>
> "Bixby argues paragraph 6b(3) must be interpreted to require the ten percent interest 'be paid on the succeeding partners' <u>entire</u> capital contributions, not just the additional capital they contributed when Welch failed to pay his assessment. . . .
>
> "Use of the words 'entire capital,' in the phrase at issue suggests Bixby's interpretation is correct. Had the parties intended interest to accrue only on the additional capital contribution made for Welch's share of the assessment, the word 'entire' is meaningless. . . .
>
> "We interpret the allowance of interest as relating to all capital repayments, including the original investment units, which must be made in their entirety before Welch may share in distributions. . . ."

(*Welch v. Bixby, supra,* at pp. 32-34.)

**3. Implementation of the Court of Appeal's interpretation of paragraph 6b**

The parties disagree on whether respondents have distributed the profits of St. George according to the Court of Appeal's opinion. According to respondents, after the Court of Appeal issued its remittitur to the superior court in 1986, Bixby began allocating and distributing partnership profits in strict accordance with the Court of Appeal's opinion. The subscribing partners succeeded to 25 percent of Welch's interest in future profits, thus reducing his interest from just over 25 percent to just over 20 percent. Distributions of partnership profits were credited first to repaying the subscribing partners' initial and subsequent capital contributions. Distributions that would otherwise have been payable to Welch and McVay were credited to interest (at 10 percent per annum, compounded annually) on the subscribing partners' original and subsequent capital contributions. According to a declaration filed by Bixby, because one of the subscribing partners has not yet been repaid all of his capital contributions with interest, Welch has yet to receive any distribution of partnership profits.

Appellants disagree. They claim that, contrary to the opinions issued by the courts, the partnership has operated by preventing Welch from receiving any distributions until the succeeding partners have received the full amount due plus interest from just Welch's share of the distributions. Respondents contend that this is "demonstrably false," as the partnership accountings reflect that the subscribing partners' original and subsequent capital contributions were repaid solely from profit distributions properly payable to them commensurate with their (adjusted) distributive interests, and that none of the funds that would otherwise have gone to Welch or McVay were utilized for that purpose.

In addition, appellants claim, Bixby's distributions have been to all partners, except Welch and McVay, and not to the four subscribing partners only until they received their contribution with interest. However, we note that the language of paragraph 6b does not prohibit distributions to the nonsubscribing partners until such time as the subscribing partners are paid in full. Instead, as the Court of Appeal noted, it provides that those contributing the unpaid share succeed to 25 percent of the noncontributing partner's interest and receive all distributions to which the noncontributing partner was otherwise entitled until their capital contributions are recouped, with interest. Only then may the noncontributing partner "participate in distributions upon a pro-rata basis with the other partners."

**4. The adoption of the fifth amendment to the agreement**

The initial partnership agreement contained a provision which provided that, "In the event any legal action or proceeding is commenced to enforce any of the provisions of this Agreement or for damage for breach of any provision of this Agreement, the prevailing party shall be entitled to reasonable attorney's fees and to costs of court." In a letter dated January 4, 1982, from the Orange County Superior Court concerning objections to its statement of decision, the superior court informed the parties: "it was decided by me that both parties prevailed to some extent, and failed to prevail on others. The case involved issues of law and equity. I exercised my discretion and awarded no fees to either side as against the other. I <u>did</u> conclude that defendant was acting on behalf of the partnership, as general partner had all the liability exposure, and was entitled to have the partnership reimburse him (or pay the fees directly to counsel)." The Court of

Appeal noted that Welch was essentially denied all substantive relief requested, but nevertheless found no abuse of discretion in the trial court's decision not to award attorney fees to the defendants in that action. According to appellants, Bixby "then began to search for a way to charge Welch with those fees anyway."

Ten months later, the limited partners adopted the fifth amendment to the agreement, which provided, in part:

> "In the event any Partner, assignee, Substituted Limited Partner, or other person or entity having an interest in this Partnership shall initiate an action against the Partnership or relating to the construction or validity of this Agreement, the Partnership may, by noticed motion, set a hearing to determine the probable validity of the Plaintiff's contentions, in like manner as provided by Code of Civil Procedure Section 484.090 (or subsequent statute of similar import), relating to probable validity of claims alleged in support of an Application for Writ of Attachment. Unless the Court shall find that the Plaintiff's claims are of probable validity, the Court shall order said Plaintiff to post a bond or other undertaking in an amount sufficient to secure the Partnership against reasonable attorney's fees and costs to be incurred by it in the defense of such action and shall stay all further proceedings in the action, until such bond or undertaking is posted."

Welch did not agree to the fifth amendment. He received a copy of it in February 1988 and objected to it by letter the following month.[3] In addition, appellants point out, Bixby did not sign the fifth amendment in his capacity as general partner, although appellants do not dispute that Bixby signed it in his capacity as a limited partner.

**5. General partner compensation**

In addition to contesting respondents' implementation of paragraph 6b of the partnership agreement, appellants also dispute Bixby's implementation of paragraph

---

**3** There is some indication in the record that Welch may have at one time claimed that he did not receive a copy of the fifth amendment. However, he concedes that it is clear by virtue of the letter his counsel sent Bixby objecting to the fifth amendment that his counsel knew of it, therefore Welch may be presumed to have known of it.

8e(1), which concerns the share of distribution to the general partner. The pertinent language provides:

> "(1) Cash Available for Distribution. The General Partners shall receive Ten (10%) percent of cash available for distribution until such time as the Limited Partners shall have received distributions equaling their total contributed capital and Fifteen (15%) percent thereafter. The rights of the General Partners under this Paragraph 8e(1) shall survive their removal from the Partnership."

Welch claims that despite the fact that Welch has not received any distributions, Bixby has been paying himself 15 percent since 1985. Bixby responds that the limited partners have collectively received distributions equaling their total contributed capital ($230,000) on November 30, 1985. Welch has not received distributions because he was burdened by his obligations as a defaulting partner under paragraph 6b. Respondents argue that to hold that Welch must receive his individual contributed capital before Bixby can receive the 15 percent of distributions would be to punish Bixby, who has fully performed his obligations, for nonperformance by one or more defaulting limited partners.

**6. The current litigation**

Welch filed suit in Los Angeles Superior Court on March 10, 2005, alleging causes of action for accounting, breach of contract, breach of fiduciary duty, seeking a constructive trust, declaratory relief, and reformation of the partnership agreement. Appellants alleged, among other things, that respondents' actions in failing to distribute cash flow to appellants was a breach of their contractual obligations. Appellants further alleged that Bixby was only entitled to receive 10 percent of profits of the partnership until such time as appellants received distributions equal to their original investment.

Respondents answered the complaint on April 27, 2005. On July 11, 2005, respondents moved to compel appellants to post an undertaking pursuant to the fifth amendment to the agreement. Appellants opposed on the grounds that the amendment was unconscionable, unconstitutional, and against public policy. The motion was heard on August 18, 2005. At the conclusion of the hearing, the court granted respondents' motion and ordered the Welches to post an undertaking in the sum of $50,000 within 30 days.

On September 1, 2005, appellants filed a motion for reconsideration on the ground that the fifth amendment was never properly approved by the partnership, which the court later denied. After appellants failed to timely post the undertaking, respondents moved to dismiss the lawsuit. On November 4, 2005, the trial court granted the motion and a judgment of dismissal was filed on November 30, 2005. Notice of entry of the judgment was filed on December 7, 2005. Appellants filed a timely notice of appeal on February 6, 2006.

## DISCUSSION

### I. The fifth amendment

This case comes to us after a motion to dismiss for failure to post an undertaking. In granting respondents' motion to dismiss, the trial court upheld the fifth amendment to the partnership agreement, which requires that, "In the event any Partner . . . initiate[s] an action against the Partnership . . . the Court shall order said Plaintiff to post a bond or other undertaking in an amount sufficient to secure the Partnership against reasonable attorney's fees and costs. . . ." Appellants challenge the enforceability of this amendment. Thus, we first discuss the validity of this contractual provision.

#### *A. Standard of review*

Appellants argue that the fifth amendment is invalid on the grounds that it was improperly adopted. In addition, appellants argue that the fifth amendment is unconscionable, unconstitutional, and against public policy. Because these issues involve undisputed facts, our review is de novo. (*Cedars-Sinai Medical Center v. Shewry* (2006) 137 Cal.App.4th 964, 976; *Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1055.)

#### *B. Adoption of the fifth amendment*

Appellants' first argument is that the fifth amendment should not be enforced because it was never validly adopted pursuant to the terms of the agreement. Appellants' argument is based on the fact that Bixby, in his capacity as general partner, never provided a signature indicating his agreement to the amendment. However, appellants do not dispute that, in his capacity as a limited partner, Bixby provided a valid signature approving the amendment.[4]

The fifth amendment was adopted in 1988, 17 years before appellants filed this lawsuit. Appellants were made aware of the amendment at that time and promptly objected to it. To account for their delay in contesting the validity of the amendment, appellants claim that courts do not rule on abstract questions or on issues that have yet to ripen into actual controversy. Thus, appellants argue, they could not litigate the enforceability of the fifth amendment until it actually affected their rights.

However, the cases appellants cite in support of their position do not involve the validity of private contractual amendments. (See *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 170-171 [involving an attack on the general access policies of the California Coastal Commission, categorized as "quasi-legislative agency action" (*id.* at p. 168)].); *Alameda County Land Use Assn. v. City of Hayward* (1995) 38 Cal.App.4th 1716, 1721-1722 [involving an attack on a memorandum of understanding adopted by two cities, a county, and their respective agencies concerning a parcel of land].) Because appellants have cited no law permitting a 17-year delay in contesting a contractual amendment to which a party is bound, we find that appellants' claim is likely barred by the doctrine of laches and the applicable statute of limitations. (See Code Civ. Proc., § 337 [providing four-year limitation period for "[a]n action upon any contract"].)

We further note that even if appellants' objections to the adoption of the fifth amendment were not barred by their unreasonable delay, the undisputed facts show that the amendment was validly adopted. The agreement specifies that, "No . . . amendments . . . shall be effective or binding upon the parties unless the same shall have been agreed

---

**4** The issue of whether the fifth amendment was validly adopted came to the trial court on appellants' motion for reconsideration of the court's order that appellants post a $50,000 bond. The trial court denied the motion on the grounds that it lacked jurisdiction as no new facts, circumstances, or law were presented.

to by the General Partners and by the holders of Limited Partnership interests aggregating a majority of such interests."

The amendment was agreed to by Bixby when, in his capacity as general partner, he circulated the fifth amendment to the limited partners for their review and approval. It was further agreed to by Bixby when he indicated his approval by signature in his capacity as limited partner. We note that, under the doctrine of *descriptio personae*, when an agent signs a contract, the addition of terms following his or her name are regarded as merely descriptive of the person rather than the relationship in which he or she signs the agreement. (*Sebastian International, Inc. v. Peck* (1987) 195 Cal.App.3d 803, 808.) Thus, Bixby's signature on the amendment as limited partner was merely descriptive. As evidenced by a letter to Welch's attorney written in response to Welch's objection to the amendment, Bixby's intention was to approve the amendment as general partner as he believed it to be "duly adopted by the Partners pursuant to Paragraph 7e of the Limited Partnership Agreement." There is no indication that any other limited partners were under the impression that the amendment had not been agreed to by Bixby in his capacity as general partner. Under the circumstances, his signature as a limited partner was sufficient to demonstrate his agreement to the amendment in his capacity as general partner as well.

***C. Unconscionability***

Appellants next contend that even if the fifth amendment was validly adopted, it is both procedurally and substantively unconscionable. California courts generally require a showing of both procedural and substantive unconscionability at the time the contract was made before a contract provision may be declared to be unconscionable. (*American Software, Inc. v. Ali* (1996) 46 Cal.App.4th 1386, 1390.)

Citing *Carboni v. Arrospide* (1991) 2 Cal.App.4th 76, 85 (*Carboni*), appellants state that procedural unconscionability occurs when there is a lack of meaningful choice on the part of one of the parties. Here, appellants argue, they had no meaningful choice because the fifth amendment was adopted over their objection, there was no meeting, and the amendment was adopted to "punish" Welch. Thus, appellants claim, there was no opportunity to discuss, modify, or protest this amendment, and the procedural unconscionability requirement is met.

We disagree. *Carboni* involved a promissory note with an interest rate of 200 percent per annum. Because the usury laws did not apply to the transaction, the court found that the loan was both substantively and procedurally unconscionable. In finding procedural unconscionability, the court concluded that there was an inequality of bargaining power on the part of the borrower because the borrower was under emotional distress when he borrowed the funds to pay his parents' medical expenses and had attempted unsuccessfully to secure a loan from other sources. (*Carboni*, *supra*, 2 Cal.App.4th at pp. 85-86.) Thus, he had no meaningful choices.

Appellants have cited no authority indicating that procedural unconscionability can be found in the circumstances before us. Welch signed the limited partnership agreement in June 1974 knowing the procedures by which amendments could be adopted. He does not argue that the agreement or the provisions regarding the adoption of amendments were unconscionable in any way. Those provisions required only the agreement of the general partners plus a majority of limited partners for the adoption of an amendment, thus contemplating that all limited partners might not agree to every amendment.

When he received a copy of the proposed amendment, Welch's attorney sent Bixby a letter acknowledging receipt of the amendment and indicating that Welch did not consent to the amendment. As set forth above, the amendment nevertheless was duly adopted in accordance with the terms of the partnership agreement by the general partner and a majority of limited partners. Welch cannot complain that he was deprived of meaningful choice as a knowledgeable businessman represented by counsel – particularly where the procedures used to adopt the amendment were carried out pursuant to terms to which he agreed.

Nor is the amendment substantively unconscionable. Substantive unconscionability usually refers to a contractual provision that operates in a harsh and one-sided manner without justification. (*Shaffer v. Superior Court* (1995) 33

Cal.App.4th 993, 1000.) Relying on *Szetela v. Discover Bank* (2002) 97 Cal.App.4th 1094 (*Szetela*), appellants argue that the fifth amendment is oppressive and harsh because it is extremely one-sided and because the agreement already contained an attorney's fees clause which would more than secure any award.

Again, appellants fail to provide any authority that the terms of the fifth amendment are substantively unconscionable. *Szetela* involved a prohibition on class actions contained in a credit card agreement. While styled as a mutual prohibition on representative or class actions, the court noted that it was difficult to envision the circumstances under which it might impact the credit card company. Thus, the credit card company created for itself "virtual immunity from class or representative actions despite their potential merit, while suffering no similar detriment to its own rights." (*Szetela, supra*, 97 Cal.App.4th at p. 1101.)

The fifth amendment is different. We agree with respondents that the fifth amendment was implemented for the protection of the partnership, and thus all of the partners – including Welch. Welch's protest that the amendment was "a deliberate act to punish Welch" is unpersuasive, especially since 17 years passed before the amendment was invoked against him. In addition, unlike the clause described above in *Szetela*, the fifth amendment does not inhibit partners from seeking redress regardless of the merit of their claims. (*Szetela, supra*, 97 Cal.App.4th at p. 1101.) Instead, the court may refuse to require the bond if the court finds that the partner's claims have "probable validity." Thus, the amendment serves to protect the partnership against meritless actions by requiring that a bond covering the costs of defending such meritless actions be posted at the beginning of the proceedings. Appellants have cited no authority that such an amendment is substantively unconscionable.

***D. Constitutionality***

Appellants next argue that the fifth amendment violates the United States Constitution because it restricts the right guaranteed by the First Amendment to the United States Constitution to petition the government for redress of grievances. Access to the courts is one aspect of the right of petition (*California Transport v. Trucking*

*Unlimited* (1972) 404 U.S. 508, 510), and this right is binding upon the states. (*Shekhter v. Financial Indemnity Co.* (2001) 89 Cal.App.4th 141, 151.) While appellants concede that the state may place reasonable restrictions upon this right, such as compelling the loser in litigation to pay costs to the winner, and allowing an action for malicious prosecution for meritless or bad faith litigation (*Norton v. Hines* (1975) 49 Cal.App.3d 917, 922), appellants argue that it is for the Legislature to control access to the courts, within constitutional bounds. Thus, appellants argue, "private (i.e., non-statutory) restrictions on access to the courts are unacceptable."

Appellants concede that they are unaware of any case declaring unconstitutional a contractual provision similar to the fifth amendment. Respondents point out that Corporations Code section 15702 expressly authorizes a court to require an undertaking when a limited partner, who sues derivatively on behalf of a limited partnership, cannot demonstrate the probable validity of his claims. (Corp. Code, § 15702, subd. (c); see also § 800, subd. (c) [allowing a corporation or defendant which is the subject of a shareholder derivative action to move the court for an order requiring the plaintiff to furnish a bond if there is no reasonable probability that the prosecution of the case will benefit the corporation or its shareholders].) The parties point to no authority that these statutes have been found to be unconstitutional. Thus, we find that a private agreement to require an undertaking when a partner brings an action lacking probable validity against a partnership does not violate the constitutional right of access to the courts.[5]

---

**5** Appellants' reliance on *Covino v. Governing Board* (1977) 76 Cal.App.3d 314, 322, for the proposition that a private agreement may not circumvent a law made for a public purpose, is unpersuasive in this context. *Covino* involved a teacher's purported waiver of his tenure rights under former Education Code section 13338.1, a statute which expressly prohibited such waiver as a matter of public policy. In contrast, no statute expressly prohibits the bond requirement set forth in the fifth amendment – in fact, two statutes described above support the concept of a bond requirement under similar circumstances.

### ***E. Public policy***

Appellants' final argument regarding the validity of the fifth amendment is that it is void as contrary to public policy. Appellants point out that contracts that are illegal may not be enforced. (*Potvin v. Metropolitan Life Ins. Co.* (2000) 22 Cal.4th 1060, 1073; see also Civ. Code, § 1667 ["That is not lawful which is: [¶] 1. Contrary to an express provision of law; [¶] 2. Contrary to the policy of express law, though not expressly prohibited; or, [¶] 3. Otherwise contrary to good morals"].) Appellants cite *Estate of Parrette* (1985) 165 Cal.App.3d 157, 161-162 as authority for the proposition that contracts ousting a court of jurisdiction are unenforceable. While the fifth amendment does not wholly oust the court of jurisdiction, appellants argue, it does interfere with the right of access to the courts and thus is unenforceable.

*Estate of Parrette* involved a revocable inter vivos trust which provided that the trustee would not be subject to the jurisdiction of the court administering the estate. The trustee interpreted the clause as preventing the beneficiaries from petitioning the court for relief for an order that, among other things, the trustee file an accounting as to each trust and be removed as trustee. The Court of Appeal disagreed with the trustee's interpretation, declining to interpret the trust as eliminating the authority of the beneficiaries to petition the court. (*Estate of Parrette*, *supra*, 165 Cal.App.3d at p. 165.) In so holding, the court noted that, "A term in an agreement ousting the court of jurisdiction is void. [Citation.]" (*Id.* at p. 162.)

As appellants concede, the fifth amendment does not go so far in restricting access to the courts. It does not oust the court of jurisdiction, and indeed does not even require that the court impose a bond unless it finds that the partner's claims lack probable validity. As set forth above, California statutes permit courts to require such bonds where derivative actions are filed against partnerships or corporations. Therefore, we find that the fifth amendment does not violate public policy.

**II. Probable validity of appellants' claims**

Having determined that the fifth amendment is not invalid for any of the reasons advanced by appellants, we now review the trial court's decision that appellants' claims lacked probable validity.

***A. Standard of review***

In deciding whether to grant respondents' motion to compel appellants to post an undertaking pursuant to the fifth amendment, the trial court was required to determine whether appellants' claims had probable validity. This required analysis of appellant's two main contentions: (1) that respondents' method of crediting cash disbursements is not in accord with the partnership agreement or prior judicial rulings; and (2) Bixby has been paying himself money as general partner to which he is not entitled. As set forth in the fifth amendment, the determination of whether these claims had probable validity was to be made "in like manner as provided by Code of Civil Procedure Section 484.090 (or subsequent statute of similar import), relating to probable validity of claims alleged in support of an Application for Writ of Attachment." Under Code of Civil Procedure section 481.190, "A claim has 'probable validity' where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim."[6]

In reviewing a determination of probable validity, we look to ensure that the trial court's factual findings are supported by substantial evidence. (*Howard S. Wright Construction Co. v. Superior Court* (2003) 106 Cal.App.4th 314, 319-320 [discussing the standard of review of a trial court's determination of the probable validity of a

---

**6** Citing *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 719, appellants claim that the probable validity standard is met where the plaintiff "states and substantiates a legally sufficient claim." *College Hospital* is inapplicable as it involved an analysis of Code of Civil Procedure section 425.13, subdivision (a), which bars inclusion of a punitive damages claim in certain actions against health care providers unless the plaintiff first demonstrates a "substantial probability" that he "will prevail" on the claim. (*Id.* at p. 709.) Even if this were the appropriate standard, as we will discuss, appellants' claims were not legally sufficient.

mechanic's lien, noting that the Legislature's intent was to make the standard on a motion to expunge a notice of lis pendens equivalent to the probable validity standard applicable under Code of Civil Procedure section 481.190].) However, if the material facts are not disputed, then the issue becomes a question of law subject to de novo review. (*Ibid.*)

***B. Respondents' method of accounting for distributions***

In determining that appellants' claims lacked probable validity, the trial court focused on the timing of appellants' claims. The court's minute order stated: "Based on the fact that there was prior litigation involving the partnership and the length of time plaintiffs have waited to challenge the defendants' distribution of profits since the prior lawsuit, the equitable Doctrine of Laches would likely apply to this case. Therefore, as required by paragraph 13d of the partnership agreement, plaintiffs shall post an undertaking of $50,000 within 30 days."

A finding of laches requires unreasonable delay plus either acquiescence in the act about which plaintiff complains or prejudice to the defendant resulting from the delay. (*Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61, 68.) "'Generally speaking, the existence of laches is a question of fact to be determined by the trial court in light of all of the applicable circumstances, and in the absence of manifest injustice or a lack of substantial support in the evidence its determination will be sustained. [Citations.]' [Citation.]" (*Bono v. Clark* (2002) 103 Cal.App.4th 1409, 1417.) Because the trial court's decision that appellants' claims lacked probable validity was based on its factual determination that laches would likely bar those claims, we look for substantial evidence supporting a finding of laches.

**1. Unreasonable delay**

Appellants do not dispute that an opinion issued by the Court of Appeal in 1986 ended the litigation regarding the interpretation of paragraph 6b of the partnership agreement. Appellants take issue with the way that respondents have been distributing profits since the time that the opinion was issued. They argue that, "Respondents have been mis-allocating the profits of the partnership for years, and are continuing to do so." At the hearing on respondents' motion to compel an undertaking, appellants' trial counsel acknowledged the length of time that had passed before appellants filed their complaint, stating: "the fact that it's gone on 17 years doesn't make it anymore [*sic*] right."

Respondents corresponded with appellants numerous times over the course of those 17 years in response to appellants' inquiries regarding respondents' methods of accounting. The record shows that on May 6, 1987, Bixby sent a letter to all limited partners explaining how distributions would be made "as adjudicated by the Trial Court." Appellants' questioning of respondents' accounting began soon after. On November 16, 1987, Bixby wrote a letter to Welch's attorney indicating that Welch had "already inspected the books and records of St. George on several occasions" and had been informed that he was free to inspect the records whenever he wished to do so. In addition, this letter sought to respond to any further concerns and offered to supply any further necessary materials. A memorandum indicates that Mr. Welch requested and was allowed to copy all St. George records on October 11, 1988. Further communications which exhibit efforts to provide appellants with partnership accounting records and alleviate apparent concerns regarding the way the partnership was distributing money were provided by Bixby on January 7, 1992, February 12, 1992, February 19, 1992, March 14, 1992, March 30, 1992, April 29, 1992, and March 24, 2001.

Appellants' complaints that they could not understand the spreadsheets provided by respondents apparently did not weigh heavily enough in appellants' favor to prevent the trial court from deciding that appellants engaged in unreasonable delay. Substantial evidence supports the trial court's decision.

**2. Acquiescence in the act or prejudice to respondents**

The trial court did not specify its findings regarding the second element of laches. However, in its motion to the trial court, respondents pointed out that the named defendants and all of the remaining limited partners of St. George would be greatly prejudiced if the agreement were reformed at such a late date and if a constructive trust were imposed upon it. Respondents argued that it would be impossible for the partnership to recover assets that were distributed to limited partners so many years ago, particularly because many former limited partners were no longer members of the partnership or had died by the time appellants filed suit. This argument was supported by evidence in the record, including a signed declaration listing partners who were deceased and/or had withdrawn from the partnership.

Based on the foregoing facts, we find that substantial evidence supported the trial court's decision that the doctrine of laches would likely apply to appellants' claims regarding distribution of the partnership assets.

***C. Percentage of proceeds distributed to the general partner***

The doctrine of laches was also the basis for the trial court's determination that appellants' claims regarding the distribution of profits to the general partner lacked probable validity. We therefore review the factual support for the trial court's determination of laches as to appellants' claim that Bixby was improperly paying himself 15 percent of partnership profits.

**1. Unreasonable delay**

The evidence showed that in November of 1988, Welch complained to Bixby that Bixby was taking 15 percent as general partner, as opposed to 10 percent. In a letter dated November 19, 1988, Welch wrote: "My attorney and I are discussing further litigation concerning, among other things, your taking 15% before limited partners have received their initial capital contributions, contrary to the provisions of the agreement." The current lawsuit was not filed until March 2005, thus a period of 17 years passed before Welch brought the issue of general partner compensation to the attention of the court.

Under these circumstances, substantial evidence supports a finding of unreasonable delay.

**2. Acquiescence in the act or prejudice to respondents**

In response to the defense of laches, appellants claim that "there is nothing indicating either acquiescence or prejudice." We disagree. Appellants' arguments that it would be relatively simple to adjust Bixby's share might be persuasive had fewer years passed. Under the circumstances, we decline to disagree with the trial court's implied finding that undoing, or even changing on a going-forward basis, 17 years of accounting would be prejudicial to Bixby and the partnership. Appellants' failure to challenge Bixby's 15 percent allocation of profits to himself after such a long period of time can be construed as acquiescence. In addition, after 17 years Bixby and the other limited partners have come to rely upon the method of accounting that the partnership has implemented throughout this time period.

**III. Respondents' defenses of account rendered and indispensable parties**

Respondents have raised two additional defenses to appellants' lawsuit. The first is the doctrine of "account rendered," in which a party to a venture is precluded from challenging matters as to which an accurate accounting was rendered and to which no timely objection was made. (*Guy Coburn, Inc. v. Tiffany P., Inc.* (1940) 37 Cal.App.2d 410, 414.) The second is appellants' failure to join all indispensable parties, because in an action to determine "the respective percentages of ownership of all the general and limited partners" of a partnership, all partners are considered indispensable parties to the litigation. (*Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 369.)

Because we have found that substantial evidence supports the trial court's finding that appellants' claims lack probable validity on the grounds of laches, we find it unnecessary to address these two additional defenses.

**DISPOSITION**

The order granting respondents' motion to dismiss is affirmed. Respondents are awarded costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICAL REPORTS.

____________________, J.
CHAVEZ

We concur:

_______________________, P. J.
BOREN

____________________, J.
ASHMANN-GERST